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IN THE

Supreme Court of the United States

JANUARY TERM, 1974

No. 73-585

DONALD J. KUSS and WALTER MACLYN CONLON,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To: The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Donald J. Kuss and Walter Maclyn Conlon pray that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on June 6, 1973.

Opinions Below

The opinion of the New York Court of Appeals affirming the petitioners' convictions are reported in 32 N.Y.2d 436, 299 N.E.2d 249. The opinion of the Appellate Division, Second Department is reported in 36 A.D.2d 306. The petitioners were convicted on January 29, 1969, after

a jury trial, of the crime of Taking Unlawful Fees (former N.Y. Penal Law Section 1826), and the Supreme Court (Fanelli, J.) imposed a jail sentence of one year for each petitioner.

Jurisdiction

The jurisdiction of this court is apparently sought pursuant to 28 U.S.C. Section 1257, Subd. 3, it being argued that petitioners' Fifth, Sixth, and Fourteenth Amendment rights to a fair trial were unlawfully interfered with because under the peculiar circumstances of this case certain trial errors were committed. Petitioner also argues that his Fifth Amendment right against self-incrimination was violated by the use of unconstitutionally obtained evidence from a prior Grand Jury hearing to effect the indictment in the present case.

Constitutional Provisions Involved
United States Constitution

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law of 1909 Involved

Section 1826. Taking unlawful fees.

A public officer or a deputy, clerk, assistant or other subordinate of a public officer, or any person appointed or employed by or in the office of a public officer, who shall, in any manner act for or in behalf of any such officer, who asks or receives, or consents or agrees to receive, any emolument, gratuity or reward, or any promise of emolument, gratuity or reward, or any money, property or thing of value or of personal advantage, except such as may be authorized by law, for doing or omitting to perform, or for having performed or omitted to perform any act whatsoever directly or indirectly related to any matter in respect to which any duty or discretion is by or in pursuance of law imposed upon or vested in him, or may be exercised by him by virtue of his office, or appointment or employment or his actual relation to the matter, shall be guilty of a

felony, punishable by imprisonment for not more than ten years or by a fine of not more than four thousand dollars, or both.

Statement of the Case

This is a case of official corruption involving a public officer's illegal receipt of monies for performance of a lawful act. Donald J. Kuss, a town councilman, was aided in his nefarious enterprise by his co-petitioner herein, Walter Maclyn Conlon, an attorney, and two brothers, Gilbert and Howard Roseman, who may or may not have been willing accomplices. The complex scheme revolved around changing use restrictions on a piece of realty in Suffolk County, New York after the petitioners purchased it and then sold it at a huge profit, part of which windfall was used to pay off the councilman.

The record suggests that the indictment herein was the result of extended and painstaking investigation, as well as the prosecutorial decision to immunize against prosecution for the relevant acts the two brothers mentioned above. The testimony of those two individuals, amply corroborated by independent proof, formed the nucleus of the prosecution's case.

In early February, 1962, James V. Fallon, an attorney practicing law in Sayville, had a conversation with his client about building garden apartments on a piece of property in Sayville, New York. Fallon then learned that covenants and restrictions prevented the construction of apartment houses on that site (A569-73, A629*). Acting in accordance with the instructions of his client who had already discussed the price with the prospective sellers,

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* References, unless otherwise noted, are to pages of Appendix to Appellants' Briefs and Additional Papers on Appeal to Court of Appeals.

Fallon, saw the petitioner Kuss on February 19th in Suffolk County, at which meeting Kuss stated that he did not think that the Town Board would act favorably upon an application to permit erection of garden apartments on the site in question. Kuss was asked to take the matter up with the Town Board (A573-7, A657-8).

To effect an amendment of covenants and restrictions in 1962, the support of the councilman from the district involved was critical (i.e., the petitioner, Kuss, in the case of Sayville), for his views were generally adopted in executive sessions of the Town Council which were held on the mornings upon which public Town Board meetings were scheduled for the same afternoons (A564-9, A804, A838-9, A870-3, A891, A957-8). Thus, while amendatory efforts could be commenced, *inter alia,* by writing to the Town Board or the Supervisor, it was often deemed advisable to start by seeking the sanction of the councilman for the relevant area (A564-9, A870-3, A1048-50).

Thereafter, Fallon received a telephone call from Kuss' secretary in Sayville who informed Fallon that the Town Board would not honor his request to modify or to amend the restrictions on the property (A578-80). Still later, Fallon's client indicated to him that he had considered buying the pertinent property even with the covenants and restrictions applying, but he had been unsuccessful in his efforts (A684).

The members of the Town Board who testified at the trial asserted that Kuss had not discussed the Fallon application with them (A805, A840, A963-4, A1029). After the property was "committed" so that Fallon's client could not obtain it, that attorney received a telephone call from Kuss' office to the effect that the Town Board might reconsider their position (A653-4).

Between 1958 and 1966, the petitioner Walter Maclyn Conlon and Gilbert Roseman were law partners (A1100-1).

During that time, according to Gilbert Roseman, the petitioner Kuss, a licensed real estate salesman, "was involved with us in real estate transactions" (A1189).

In the latter part of February, 1962, the petitioner Conlon and the witness Gilbert Roseman had a conversation in their Nassau County office respecting the same piece of property (A1101-2). Gilbert Roseman recounted from the witness stand what Conlon had told him at that time:

> "Walter told me that Donald Kuss had come to him with a real estate transaction where we could buy in Sayville an apartment house site for $43,000 and that Donald would be getting an additional $10,000 for bringing up this transaction. As I understood it, it was a site that was presently zoned Business where you were allowed to build apartment houses at that time in the Town of Islip.
>
> • • •
>
> ". . . And he further stated that the Town Board of the Town of Islip at a future date was going to change the law so you no longer could build apartment houses in a business zone but at that time it was allowable and that we should consider going into the transaction" (A1117).

The petitioner Conlon, at the pertinent time, also remarked that ". . . it was all worked out [and] that it was an all-cash deal" (A1118). The conversation culminated in a suggestion by the witness that he and Conlon seek the advice of the former's brother, the witness Howard Roseman, an experienced builder (A1120).

Within a day or two, the Roseman brothers and the petitioner Conlon met in Nassau County, at which time Conlon stated that Kuss had identified the piece of realty in question (A1122-3). The Roseman brothers, at the trial, described consistently Conlon's statements during

the pertinent colloquy (A1117-22; A1335-8). Howard Roseman's account was as follows:

> "Mr. Conlon told me that he was alerted to a piece of property . . . on Lakeland Avenue and Johnson, for the possible purchase of this property.
>
> • • •
>
> "That he had been alerted to this piece of property by Mr. Kuss who was his friend and a Councilman in the Town of Islip about the advisability of buying this piece of property for the use of an apartment house site and he tried to tell me the various aspects of the property and he wanted my advice as to first evaluating it and would I be interested in participating in the purchase with my brother and with him.
>
> • • •
>
> "He told me the property was zoned as a shopping center as its present zoning was a shopping center but under the existing laws and ordinance of the Town of Islip that an apartment house was a permitted use on property zoned business and that there were many features to this property that would be interesting to me as a—having a background in the real estate and building business, the two features being, one, that there was proposed legislation in the Town of Islip that was going to change this existing rule such as you could use the property as an apartment house in a business zone because there was going to be legislation changing that and there was going to be a separate classification for apartment houses, separate and apart. There was also proposed legislation changing the rule of density; under the existing rule in the Town of Islip at the time of my meeting, the ordinance permitted 32 apartment houses on an acre and the proposed legislation would change that so that there would only be 16 apartments to the acre.

"So therefore, if an apartment were built on that property, we would have the value of having a hundred apartments because of the 3.3 acres of the property and the 32 to an acre would permit 100 apartments, and that would be the last apartment house that would be permitted having that many apartments in that small an area, and that was one of the features that would make this property rather valuable and I should keep in mind in the evaluating and giving an evaluation as to the price that had to be paid for the apartment house.

• • •

"He told me the price was $43,000 and that there was to be a payment to Mr. Kuss of approximately $10,000." (A1336-7)

The petitioner Conlon also stated, according to Howard Roseman, that everything had been negotiated and worked out by Kuss (A1338). When Howard Roseman complained about the sum to be paid Kuss, Conlon explained that it was "'. . . because this was mare than just a brokerage, this was Mr. Kuss' transaction, he had brought him all the terms and conditions, he did more than what would be normally a prim [sic] function of a broker,' and that for my purposes in evaluating I should evaluate it on the basis of the purchase price being $53,000" (A1338-9).

Subsequently, Conlon assured the Roseman brothers that changing the covenants and restrictions was a routine matter (A1144, A1413).

The contract of sale (Exh. 14) was signed on or about March 10, 1962, in Nassau County, the buyer being D.W.H. Corporation which was "owned" by the two Rosemans and the petitioner Conlon (A1130, A1202, A1257-9, A1414). The purchase price was $43,000, and the contract obligated the sellers to execute in writing their consent to annul and to cancel existing covenants and restrictions

but the purchase was not conditioned upon the removal of the restrictions (A1200-1; A1348-9; Exh. 14). Moreover, the contract recited that no broker had brought about the sale, and it made no mention of any finder's fee (Exh. 14). Concerning the oral agreement (i.e., between the petitioners and the Roseman brothers) it was Howard Roseman's ". . . understanding with Mr. Kuss through Mr. Conlon that Mr. Kuss was not to be paid any money on this transaction until such time as we had received our money . . ." (A1357).

On March 20, 1962, the Town Board passed a resolution, effective May 1st, taking apartment houses out of the B-1 category and placing them in a CA classification, public notice of which pending change had been ordered by the Board to be given on February 27th (Exh. 3B; A490-503, A801, A869).

Also on March 20th, the Town Board unanimously granted, on the motion of the petitioner Kuss, an application of the sellers to annul and to repeal the existing covenants, and restrictions, replacing those limitations with a new set which permitted the erection of apartment houses —construction to commence within a year and to be completed within three years—and which also called for some property at the southeastern end of the plot to be dedicated to the Town of Islip "on demand" so that a traffic hazard could be eliminated (Exh. 3C; A504-7, A755-8, see A996). In October 1962, the Town Board passed a resolution concerning density which reduced the number of apartments that might be built on a given area, and, while 100 apartments ultimately were built on the pertinent site, only 64 could have been legally erected had the later legislation controlled (Exh. 4A; A507-11, A785-91).

The 1962 covenants and restrictions which were approved by the Town Board had been drawn up and filed by the attorney-petitioner Conlon in the name of the sellers, and the provisions of the 1957-58 covenants and restrictions

excluding the northerly 75 feet and the 15-foot-strip along the easterly side of the plot from the intended use were not carried over into the new document (Exh. 11; A1127-30, A1348). In connection with that subject, one Estelle Clark, secretary in the law firm of Conlon and Roseman at the pertinent time, testified that, prior to March 20, 1962, she had typed the resolution in the Town Clerk's file (Exh. 2F) at the behest of Conlon, excepting that portion indicating that the relevant motion had been made by Kuss and seconded by Councilman Giordano, and that, also at Conlon's direction, she had typed the 1962 "Declaration of Covenants and Restrictions" (A766-7; Exh. 11).

The petition for the 1962 change in covenants and restrictions was signed apparently in Nassau County at the closing of April 2, 1962 (a date advanced from the original one for the purpose of protecting the vested interests of the Rosemans and Conlon) by the sellers, but these proposed limitations, as already noted, were drawn and filed with the Town Board by Conlon, who thereafter also filed the "Declaration of Covenants and Restrictions" (A1139-40, A1148-51, A1203, A1208, A1346-8, A1354, A1530-4). The petitioner Conlon based his application to the Town Board, *inter alia,* on data furnished him by Howard Roseman, who did not see the final draft of the proposed modifications submitted to the Town Board (A1427, A1534). At the behest of the petitioner Kuss, 50′ of the parcel were dedicated to the Town in the application aforesaid (A1422). Howard Roseman gave the new covenants and restrictions to Conlon at the closing, and the latter returned them the next day having first had Supervisor Harwood sign them, after which they were filed with the Town of Islip and sent to a title company so that they would be recorded in the County Clerk's Office (A1369, A1464-6).

The members of the Town Board at the time relevant, excepting the petitioner Kuss, testified at the trial, in essence, that they had voted in favor of the 1962 sellers' application

because of the petitioner Kuss' recommendation, without which assurance the measure would most likely have been defeated, according to their surmise (A804-5, A838-40, A954-64, A1025).

The two Roseman brothers and Conlon (each having invested in this venture $13-to-$15,000, which had been borrowed from a bank)—received such favorable reaction from a "feeler" advertisement that they decided to sell the property (*ibid.*). Thus, on July 16, 1962, D.W.H. Corporation sold the property in question for about $107,500 to Jack Wallace who assigned his interest to a W.I.P. Realty Corporation (A1151, A1351-2; Exh. 27). Similarly, the Rosemans and Conlon assigned, individually and in writing, the mortgage to a bank, and, incidentally, their signatures on the assignment were identified by Estelle Clark (A1263-4, A1765-6; Exh. 15). Some $19,000 was actually received at the closing, and a $5,400 check was then paid by D.W.H. Corporation to Conlon whose endorsement was identified by the witness Clark (A1471, A1764-5; see A1537, Exhs. 28, 28A, 30 and 31).

Besides the D.W.H. Corporation—which was formally dissolved on June 3, 1964—the Roseman brothers and Conlon, together with one Jack Farber, "owned" Howard Roseman Associates, Inc., a nominee corporation used for the convenience of banks which charged higher interest rates on mortgages to corporations than individuals (A1281-2, A1287-8). Also at the time now relevant, the petitioner Kuss was doing business as the Project Development Company, and his was the only authorized signature on the Project Development card at the Franklin National Bank (A529-30, A536; Exhs. 7 and 9).

On July 17, 1962, a check (Exh. 17) drawn on the Howard Roseman Associates' account in the amount of $2,700 and payable to the Project Development Company was given by Howard Roseman to the petitioner Kuss at the Roseman-

Conlon law office in Nassau County, which check was given pursuant to the agreement to pay that defendant approximately $10,000 for his services (A1153, A1355-6). The check was not drawn on D.W.H. Corporation because it had insufficient funds, and, moreover, the money was paid at that time because Kuss was pleading that he needed funds, albeit the understanding was that he was not to receive payment until the others had received their money including payment of the mortgage taken back by D.W.H. Corporation on the sale of the subject parcel of property (A1355-6).

On May 25, 1964, a second payment for services rendered was made by Conlon to Kuss in the form of a $6,500 check (Exh. 18) drawn on the account of Howard Roseman Associates and made payable to Project Development Company, which instrument was thereafter deposited to the payee's account at the Franklin National Bank (A545-6, A1166-7, A1358-9, A1366; Exh. 8). Again, the check was drawn on the Howard Roseman Associates' account because D.W.H. could not cover that great an obligation (A1358-9). The two sums represented by the checks were shown on D.W.H.'s books as accruals or obligations owed to Project Development Company (A1309-10, A1360-5; Exh. 29). Similar entries appeared on the books of Howard Roseman Associates (A1234-5; A1309-10).

In late summer or late fall of 1965, the petitioner Kuss had a conversation with Howard Roseman about the former's prospective appearance before the grand jury (A1366-7). At that time, Kuss stated that he would tell the investigative body that he did not receive any money in the D.W.H. transaction and that he would assert that the money he did get was from a subsequent deal, the reason being that ". . . I voted on the resolution in 1962 on the covenants, I don't want it shown that I received any money in that transaction" (A1367).

POINT I

Petitioners received a fair trial guaranteed by the Constitution and any alleged errors are either harmless errors correctly decided by the state reviewing courts or harmless errors which did not affect the substantial rights of the petitioners and did not contribute to their convictions.

A.

The Trial Court's Charge to the Jury Did Not Require the Petitioners to Prove Their Innocense. The Alleged Error Did Not Affect Their Substantial Rights and Should Be Disregarded Because Petitioners Failed to Object to the Instructions.

Kuss' defense at trial merely consisted of an attempt to show through a defense witness and by cross-examination of prosecution witnesses that the monies in question had been received by him in connection with another transaction (A1707-15), an effort that at most raised an issue of credibility for jury resolution—a determination that may not be faulted on this record (*People* v. *Tendetnick*, 237 App.Div. 9, 11 [1st Dept., 1932]; *People* v. *Atlas*, 183 App.Div. 595, 600 [1st Dept., 1918], aff'd 230 N.Y. 639 [1921]). On that score, the Trial Court's instructions (A2011-2) to which exception was not taken, did not improperly place the onus of proof on Kuss, as he now asserts on the basis of an incomplete quotation of the pertinent portion of the charge.

The balance of the court's charge on this point is as follows:

> "But, on the other hand, if you find the payment of $6,500 was not given to Kuss on . . . (another deal—author) . . ., then you will consider whether or not the People have proved beyond a reasonable doubt the

charge in the indictment against these defendants." (A2012)

Additionally, the court specifically instructed the jury concerning reasonable doubt (A1904-5).

In short, since the petitioners failed to object to the court's instructions, the construction of the New York Court of Appeals' jurisdiction under the Constitution of the State of New York (Article 6, Section 3, subd. a; see also CPL 470.05) precludes the raising of this issue for the first time in the Court of Appeals, and by extension in this court.

The alleged error did not affect a substantial right of the petitioners and should be disregarded (see also Fed. Rules Cr. Proc., rules 51 and 52 [a]).

B.

The Indictment States Sufficient Facts to Constitute the Crime of Taking Unlawful Fees in Violation of Former Penal Law Section 1826 and the State Courts Found No Merit to Petitioners' Contention.

Petitioners patently strain to claim a jurisdictional defect in the indictment leading to reversible error by the Trial Court respecting burden of proof discussed in subdivision A. This argument has been apparently inspired by the Court of Appeals discussion about pleading statutory exceptions and provisos in the case of *People* v. *Kohut* (30 N.Y.2d 183 at 187). Seizing upon the fact that the petitioners had interposed unsuccessful demurrers to the indictment, which demurrers, insofar as now relevant, were couched in broad statutory terms (A8-35)—and completely overlooking the fact that this plaint was not voiced by them in the Appellate Division and rejected in the Court of Appeals—petitioners postulate that a clause in former Section 1826 of the Penal Law (i.e., ". . . except

such as may be authorized by law . . .") constitutes an "exception" which must be negatived in an indictment. They then aver that there was a failure to do so here, with the result that the trial judge put the burden on them to etstablish that the fee herein had been received for another deal. The argument is specious.

To begin with, the Court of Appeals has construed the relevant wording in the statute as incorporating by reference not only other statutes but any mechanism (e.g., ordinance or contract) legally sanctioning payment of the pertinent fee (*People* v. *Clark*, 242 N.Y. 313 [1913]). That court in discussing Penal Law Section 1826 stated:

> "In this case the words ("not authorized by law"—author) must receive a broader construction if the purpose of the statute is to be effectuated. It applies alike to all offices, regardless of whether their compensation is fixed by statute or ordinance or contract legally made. It does not attempt to fix what compensation or reward may be lawfully obtained; but it prohibits and makes criminal the asking or receiving of more than is lawful" (at p. 327).

With the sources of legal approbation being virtually limitless, logic dictates that, assuming we were dealing with an "exception", use of the statutory term—"Taking Unlawful Fees"—in the present accusatory instrument came as close as any draftsman could come to negativing that "exception". Moreover, the obvious legislative intendment to subsume all sources conferring legality on a given transaction mandates the conclusion that we are dealing with a so-called "proviso" which does not have to be negated in the indictment and which, when there is a claim thereunder, must be put in issue as a defense at the trial (see *People* v. *Kohut, supra;* 1 Bishop, Criminal Procedure [2d Ad. 1872], Sections 631 et seq.). And, of course, we have seen that the charge to the jury (subdivision A) put no burden of proof on Kuss.

C.

Petitioners Were Not Denied Their Right to Confrontation During the Cross-Examination of the Prosecutor's Witnesses Because the Prosecutor Gave the Petitioners' Pre-Trial Tape Recorded Statements of the Witnesses and the Case Was Adjourned in Order to Permit Defense Counsel to Hear the Tapes.

Counsel for Kuss stated that he had subpoenaed the District Attorney of Suffolk County, together with some records, for the next day with a view towards trying to establish that Howard Roseman had not disclosed until the 1967 grand jury probe that any payments had been made by him for the D.W.H. transaction (A1663-4). In the course of those remarks, the attorney in question voiced his belief that Howard Roseman had not made the disclosure before the 1965 grand jury (*ibid.*).

After pointing out that he had been provided by the prosecutor with the transcript of Gilbert Roseman's testimony before the 1965 grand jury (as well as that of Howard Roseman—A1700), the same defense lawyer said he wished to find out if tape recordings had been made of Howard Roseman's testimony in either 1965 or 1967 (A1664-6). At that point, the prosecutor remarked that counsel had asked him to produce any statement made by Howard Roseman in 1965, and the prosecutor went on to state, in substance, that he had gone through every item in the case without finding such a statement (A1667).

The Court asked the prosecutor about 1967, and the latter remarked that a tape recording of a 1967 statement of Howard Roseman was in existence (*ibid.*). Whereupon, the same defense attorney asked for the tape, after which the prosecutor stated there would be no problem and that counsel should have asked for it at the proper time

(A1668). Then, the Trial Court directed the opposing attorneys to "make arrangements" (*ibid.*).

Further discussion ensued, during which counsel for Kuss asked about tape recordings of statements made by Gilbert Roseman (*ibid.*). The prosecutor responded that there was a tape for a 1967 interview but nothing for the year 1965, in which earlier year the prosecutor was not on the staff of the Suffolk County District Attorney (A1668, A1671). At the prosecutor's suggestion, the Court agreed that the playing of the tapes could begin immediately (A1669).

The record does not indicate that the playing of the tapes commenced at that point. In any event, Conlon rested his case that afternoon, with the result that Kuss had no witnesses present in court (A1686, A1693). At that juncture (seemingly 3:45 p.m.), the prosecutor suggested that the rest of the day could be used for listening to the tapes (A1693-4). Thereafter, the Court adjourned the case until Thursday morning so that the entirety of the next day could also be used for that purpose, and the trial jurist indicated that, since he would not be present at the playing, notations should be made of anything to be called to his attention (A1694-5).

On Thursday, counsel for Kuss made successful applications to recall the Rosemans for further cross-examination (A1716, A1728: relevant testimony summarized in fact statement above). Gilbert Roseman then was examined by Kuss' counsel and a single statement was adduced which the former had made on November 19, 1967 to police officers from the District Attorney's Office which contradicted his trial testimony on a matter concerning Kuss, after which the prosecutor sought to rehabilitate the pertinent witness (A1716-28). Also of note in connection with the examination of that witness is the fact that colloquy occurring during it indicates that the parties dis-

cussed the contents of the tapes in chambers with the trial judge (A1720), and the fact that Conlon's counsel did not choose to examine the witness further on this occasion (A1723).

After Gilbert Roseman was excused from the witness stand after having been recalled as a witness, the attorney for Kuss mentioned that he had listened to the 1967 tapes on Tuesday afternoon and for six hours on Wednesday, after which the Court apparently asked him if he was directing himself "• • • to this particular tape because the District Attorney has given you all other documents that you have asked for that he has" (A1729-30). Whereupon, the same defense attorney began to voice a plaint, which he commenced by saying that the prosecution had been tardy in apprising him about the taped interview thereby preventing him from obtaining a transcript (A1730-1). For that reason and because he had let some of the discrepancies he heard in the tape go unnoted because he thought that he would hear the tape replayed, counsel allegedly was unable to develop the discrepancies aforesaid when re-examining Gilbert Roseman (*ibid.*).

Counsel then asserted that the lack of a transcript therefore prejudiced both defendants, and he went on to expostulate that little could be done at that stage and also to take exception to an alleged judicial ruling requiring him to rely on his own recollection in conducting the pertinent examination (A1732). Thereupon, the Court remarked that no such limitation had been imposed, and that, in chambers, objection had been sustained as to one projected defense question, after which the Court explained the basis for that ruling (A1732-4).

Next, the trial judge asked Kuss' counsel what he wanted done "right now", to which the response was that he did not know, followed by a comment about not having had the transcript (A1734). Whereupon, the Court pointed out that there had been ample opportunity to hear the tape;

that everything on it could not have been contradictory; and that counsel had been at liberty at any time to mark the tape or stop it for the purpose of copying down anything said thereon (A1735-6).

Next, the prosecutor pointed out that he had provided the defense with every document they had requested when asked for, and that there had been no demand made for the 1967 tape until the prosecution's case had been put in (A1736). The prosecutor and counsel for Kuss then engaged in some colloquy about the situation, with the latter acknowledging that the prosecution had been helpful by stipulating to several discrepancies (A1737-9). Then, the prosecutor commented that there were only two discrepancies on the tape, after which the other lawyer acknowledged that the prosecutor was right about the first one (A1739).

Subsequently, the Court asked if counsel for Kuss wanted more time, which question received an affirmative answer, after which the prosecutor stated for the record that he had no transcript of the pertinent tape (A1739-40). Next, the Court made a comment to the effect that counsel had had enough time to go over the tape, after which the attorney for the defendant Kuss indicated that there was one question and answer on the tape which he considered vital (A1740). Then, the Court commented about how lenient it had been and about the ability of the Appellate Division to obtain the tape if necessary to pass on his ruling, remarks which prompted the attorney for Kuss to remark about the scrupulous impartiality of the Trial Court (A1740-1).

After that exchange, the presiding jurist said he was unclear about whether additional time to hear the tapes was being requested by Kuss, after which the attorney for that defendant stated the following:

> "If your Honor will be good enough to just let me have the one question and answer that this witness would give and that we could have a reporter take

it out from this whole tape, that would satisfy me, because that was a question * * *" (A1741).

The Court granted that request, after which the pertinent question and answer concerning the defendant Kuss only were located on the tape and then that colloquy was stipulated into the record in the presence of the jury (A1741-4). Thereafter the lawyer for Kuss, in answer to a question by the Court, stated that "that" was what he had wanted (A1744).

Thereafter, Howard Roseman was called to the stand for further cross-examination but he was asked no question concerning his pertinent pretrial interview of November 1, 1967 (A1745-61).

At this time, the defendant Conlon, who voiced no plaint below about the lack of pertinent transcripts, does not specifically challenge the pertinent ruling of the trial justice.

Also, we note that Kuss resorts to innuendo while arguing that the lack of transcripts deprived him of his fundamental right to confront witnesses. The implication is that, on the *Huntley* hearing concerning a recorded statement made by Conlon to police officers from the Suffolk County District Attorney's Office which the prosecution did not use later at trial, the prosecutor indicated that the tape in question had not been transcribed while the fact was that it had been. A glance at the record, however, will readily destroy the relevant innuendo. From the outset, the prosecutor indicated that the tape had been transcribed and that he was having copies of it made (A185). Moreover a copy of the 110 page transcript was given to the defense (A283-6), which used it as a basis for examination of at least one witness (A287-99).

Still, it seems to us that the possibility that a witness' recorded, pre-trial statement may differ however slightly,

from his trial testimony does not necessitate the prosecution's transcribing the statement in advance of trial and the Court of Appeals so held in this case (see also *People* v. *Rosario*, 9 N.Y.2d 286; *People* v. *Malinsky*, 15 N.Y.2d 86; *Jencks* v. *United States*, 353 U.S. 657; 7 ALR3d 181).

There was no resultant prejudice to the defendants. For the defense was given an ample opportunity to listen to them and to take notes, after which the pertinent witnesses were recalled for further cross-examination. The fact that additional cross-examination was conducted without a transcript was fully explored in the State Courts and the Trial Court took remedial action by insuring that both inconsistencies in Gilbert Roseman's testimony were elicited before the jury. Indeed, counsel for Kuss expressly indicated his satisfaction with the action taken by the trial justice.

D.

Relevant Out-of-Court Declarations of a Co-Conspirator Are Admissible in the Discretion of the State Court Judge Where the Statements Conceal the Fact That a Crime Was Committed or Conceal the Identity of the Perpetrators Because This State Recognized Exception to the Hearsay Rule Does Not Violate the Confrontation Clause of the Sixth Amendment.

Petitioners do not allege that there was insufficient evidence of a conspiracy agreement, and the Court of Appeals held that there was clearly sufficient evidence from which the jury could find both petitioners guilty.

The trial testimony made out a showing of a conspiracy sufficient to warrant admission into evidence against both petitioners any acts or declarations by either of them made in furtherance of the common scheme during the lifetime of the plot. For it is not disputed that "any act or declaration by one co-conspirator, committed in furtherance

of the conspiracy and during its pendency, is admissible against each co-conspirator provided that a foundation for its admission is laid by independent proof of the conspiracy" (72 Harvard Law Review, Criminal Conspiracy, pp. 920 *et seq.*, at pp. 984-985; *People* v. *Jelke,* 1 N.Y.2d 321; *People* v. *LaBarbera,* 274 N.Y. 239; *People* v. *Ryan,* 263 N.Y. 298). That rule obtains even in the absence of a formal conspiracy charge in the indictment (*People* v. *Luciano,* 277 N.Y. 348, at 358 [1938], a type of charge that was time-barred in the instant case. Moreover, only a *prima facie* showing of conspiracy need be made at the trial in order to make acts and declarations of one conspirator admissible against all of them as proof of the illegal agreement (*People* v. *Connolly,* 253 N.Y. 330, 340 [1930]; *People* v. *Cassidy,* 213 N.Y. 388, 391 [1915]; *People* v. *Davis,* 56 N.Y. 95, 102-103 [1874]).

Thus, the trial judge properly admitted against Kuss a number of his (i.e. Kuss') statements which Conlon repeated to the Rosemans. In that instance, the lower court jurist admitted a post-conspiracy statement attributed by Conlon to Kuss (A1757-9). In *Dutton* v. *Evans,* 400 U.S. 74 [1970], this court upheld a Georgia statute which allowed declarations of one co-conspirator to be admitted as against the other; "so long as the conspiracy to conceal the fact that a crime had been committed or the identity of the perpetrators of the offense continued". (See also *California* v. *Green,* 399 U.S. 149 at 155-56, 22a CJS Criminal Law, Section 770). The co-conspirators exception has been restricted to a narrower scope in the federal courts (*Grunewald* v. *United States,* 353 U.S. 391; *Krulewitch* v. *United States,* 336 U.S. 440; *Fiswick* v. *United States,* 329 U.S. 211).

At a point in the prosecutor's summation (A1878) when reference was made to the relevant testimony, the Trial Court stated in the jury's presence that a proper admonition would be given to the jury. Thereafter, he made

good that promise by voicing a curative instruction, during which remarks he informed the jury of his error (A1988). That action, in our view, negated any likelihood of resultant prejudice to the petitioner Kuss. Additionally, the subject matter of the pertinent utterance was already in evidence by virtue of the testimony of the attorney Fallon, to wit, that Kuss had learned about the land opportunity from a local lawyer. In view of the aforesaid considerations, any error in this connection, may readily be deemed innocuous (Code of Criminal Procedure, Section 542, now CPL Section 470.05 [1]).

E.

The Indictment Found Against Petitioners Was Obtained From Sufficient Evidence Which Was Independent of Any Testimony, Links or Leads Furnished by the Petitioners When They Testified at a Previous Grand Jury Hearing, and Assuming *Arguendo* That the Indictment Was Not so Found, Petitioners Are Only Entitled to Testimonial Immunity.

The defendants herein were indicted by a Suffolk County grand jury in December, 1967, but neither testified before that body. Previously, both Conlon and Kuss had testified, after executing waivers of immunity, before a different grand jury which sat in that County in 1965-1966 (A51). At the time they did testify, petitioner Kuss was an Islip Town Councilman and petitioner Conlon apparently was the Islip Town Attorney. Among other pretrial motions herein, the petitioners made one to dismiss the indictment. The supporting papers indicated that the petitioner Kuss had been a public official at the time of his 1965 grand jury appearance; that he had testified because of fear of being removed from office, and that Kuss' statements before that body were used in the 1967 proceedings to obtain the indictment. Those papers did not voice any plaint about "leads."

In connection with his denial of the motion, Justice Stark, himself, inspected the minutes of both grand jury proceedings, and he concluded, *inter alia*, that Kuss' statements before the earlier grand jury were not presented or read to the second deliberative body, nor was the testimony of any other witness given during the earlier probe shown or read to the second grand jury (A51-2).

Later, Kuss moved to inspect the grand jury minutes and to dismiss the indictment on the grounds that he had been coerced into testifying before the earlier grand jury because of the New York State Constitution's sanction against a public official's refusal to execute a waiver of immunity, and that his statements aforesaid, or leads derived therefrom, had been used against him by the prosecution in obtaining the indictment (A71-81). No effort to demonstrate his thesis was contained in the supporting papers of the petitioner Kuss, a defect pointed up in the opposing papers of the prosecution wherein it was also asserted that the indictment was obtained "• • • from evidence which was obtained independent of any testimony, links or leads furnished by the petitioner before the September 1965 Grand Jury" (82-3). Justice Fanelli denied this motion in all respects, postulating an infringement of Kuss' rights under the Fifth Amendment and reasoning that such an abridgement would not result in transactional immunization barring his trial on the 1967 indictment (A84-6). Additionally, the jurist determined that there had been a fatal failure of proof on Kuss' part to demonstrate that his testimony during the earlier grand jury proceedings, or leads derived from it, had formed a basis for his subsequent indictment by a different grand jury (*ibid.*).

Thereafter, Kuss successfully obtained reargument of the motion described in the last paragraph, and he urged in his supporting papers that "leads" had been obtained

as a consequence of his testifying before the grand jury because he had told that group about his financial dealings with Howard Roseman who, at some undisclosed point, told investigators from the District Attorney's Office about those same transactions (A71-4). On this subject, Justice Fanelli ruled that he could not at that juncture determine the accuracy of the contention with any degree of certainty, and that its resolution must await the trial (A69-70, 87).

No claim is now made by the petitioner Kuss that he made objection to any item of evidence introduced at the trial in the way suggested by Justice Fanelli's admonition. Rather, the petitioner Kuss offers this Court an exposition of the governing law without relating it to this case and without attempting a factual showing of just what evidence or leads obtained as a consequence of his appearance before the earlier grand jury were utilized by the second grand jury in order to indict him. Also, the petitioner Kuss faults Justice Fanelli for deciding the initial motion without a hearing, and that petitioner makes no reference to that jurist's ruling upon reargument of the motion. None of the petitioner's plaints has merit, however.

To begin with, we concede that a violation of petitioners' Fifth Amendment rights before the grand jury would have prohibited the use of their testimony or leads derived therefrom as proof of their guilt at the trial [*Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Garrity* v. *New Jersey,* 385 U. S. 493 (1967)]. However, the existence of the relevant constitutional sanction did not, *ipso facto,* make the execution of a waiver of immunity by them unconstitutional [see *People* v. *Leo,* 23 N. Y. 2d 556, footnote 2, p. 561 (1969); *Passim People* v. *Goldman,* 21 N. Y. 2d 152, 156-159 (1967)]. Moreover, petitioners fly in the face of the authorities discussed herein when they urge that a coerced waiver of immunity would have cloaked them with transactional immunity [cf. CPL, § 190.40; see *Kastigar* v. *United States,* 406 U.S. 441 at 459-462 (1972).

Our remarks about a hearing prompt us to note the new Article 210 provisions of the CPL which now enable immunity claims to be tested by hearings precipitated by motions to dismiss the indictment. If in such a hearing the waiver of immunity were found to have been coerced, only testimonial immunity would attach, leaving open the "leads" question to be handled at trial. That is to say, the statutory scheme contemplates dismissal of an indictmen where transactional immunity barred the finding of an indictment; but, where testimonial immunity only is involved and the testimony itself was not used to obtain the indictment, the statute makes no provision for vitiating the indictment, much less for resolving the "leads" type of question now principally encountered in Fourth Amendment cases [see, *e.g., People* v. *Munger,* 24 N. Y. 2d 445 (1969)]. As the following discussion will show, the procedure employed at the trial stage by the court cannot be termed erroneous for Kuss was simply told to wait until trial to press his claim. Unfortunately for him, he delayed doing so until a point in the trial when granting of his request was no longer feasible. Accordingly, he should not be offered any further opportunity by this Court to pursue the relevant tack.

Again, we see no reason for ordering such a proceeding. An infringement of Kuss' pertinent rights would have entitled him not to transactional immunity but only testimonial immunity if he had in fact been a target of the invesigation, his status as a "target" being left open on this record [see *e.g., People* v. *Yonkers Contracting Co., Inc.,* 17 N. Y. 2d 322, 335 (1966); *People* v. *Laino,* 10 N. Y. 2d 161 (1961)]. Assuming, then, as Justice Fanelli did below for purposes of the motion, that there had been such a violation of right, the issue would be whether the pertinent contention about improper use of testimony or leads was properly handled at the trial court stage. As for that, the cases predating CPL, § 210.20 (d) and applicable here suggest that such a claim may be properly tested by mo-

tions to inspect the grand jury minutes and to dismiss the indictment [see, *e.g., People* v. *Laino, supra; People* v. *Steuding,* 6 N. Y. 2d 214, 217 (1959); *People* v. *Ryan,* 11 A D 2d 155 (3rd Dept. 1960); *People* v. *Gaparino,* 61 Misc. 2d 1076 (Westchester Co. Ct. 1970); *People* v. *Werkes,* 46 Misc. 2d 1020 (Queens Co. Ct. 1965); *People* v. *Seaman,* 174 Misc. 792 (Sup. Ct. Orange Cty., 1940); *People* v. *Macner,* 171 Misc. 720 (Sup. Ct., Oneida Cty., 1939); *People* v. *Steinhardt,* 47 Misc. 252 (Sup. Ct., N. Y. Cty., 1905)]. But, there is a flat statement in *Ryan* that the proper remedy is an in-trial motion to bar receipt of evidence.

Looking now at Kuss' effort to dismiss the indictment, it is clear that he cannot now establish impropriety. Justice Fanelli was acting upon precedent when he held that the failure of proof in connection with the first Kuss motion made inspection of the minutes unwarranted, for such was, at the pertinent time, the rule with respect to inspection—dimissal motions [*People* v. *Jackson,* 18 N. Y. 2d 516, 518-519 (1966); *People* v. *Howell,* 3 N. Y. 2d 672 (1958), see CPL, § 210.30], including one made in this particular context [*People* v. *Ryan, supra*]. *Jackson* and *Howell* make it clear that Justice Fanelli's order is not reviewable here [see *People* v. *Strauss,* 165 App. Div. 58 (2d Dept. 1914); *Matter of Montgomery,* 126 App. Div. 72 (1st Dept. 1908)]. But, in any event, this Court has the benefit of knowing from Justice Stark's earlier decision that no verbatim testimony from the earlier grand jury proceedings was utilized to secure the instant indictment. Beyond that, no statement made before the grand jury by Kuss, or Conlon for that matter, was introduced at the trial.

As for the second order and decision by Justice Fanelli, there is similarly nothing about it which should disturb this tribunal. For one thing, a perusal of the papers supporting the motion will make it clear that no basis was spelled out upon which that jurist could have made a determination, with the result that he left it incumbent upon the

defense to make appropriate objections about "leads" at trial. At this time, only the pretrial dispositions are attacked by Kuss, and he makes no claim that in-trial protests were made, so as to preserve the point for Appellate review [see *e.g., People* v. *Campbell,* 23 A. D. 2d 852 (2nd Dept. 1965); *People* v. *Kahigus,* 18 A. D. 2d 1064 (1st Dept. 1964)].

We note of course Kuss' references to cases arising under the Fourth Amendment where claims about the evidentiary "fruits" of an illegal seizure of evidence are tested at hearings. But in those Fourth Amendment cases appellate courts in New York will not take cognizance of a plaint unless it was properly raised below [*People* v. *Friola,* 11 N. Y. 2d 157 (1962), see Code Crim. Proc., §§ 813-c and 813-d; now CPL, Art. 710]. Interestingly, that same approach has been taken by the Court of Appeals in dealing with at least one type of Fifth Amendment claim—the Amendment herein involved [see *People* v. *McQueen,* 18 N. Y. 2d 337, 344 (1966)]. In that vein, this Court has ruled out the theory that a pretrial motion raising a Fifth Amendment claim automatically injects that issue into the trial [*People* v. *Cefaro,* 23 N. Y. 283, 285-289 (1968)]. Additionally, it may be observed that the privilege against self-incrimination is a personal right which may be waived by a defendant [*People* v. *Stueding, supra* at 222].

Here, Kuss' pretrial efforts failed to raise the pertinent question properly. Although explicitly instructed by the jurist in question to pursue his application at trial, that petitioner failed to take appropriate action, thereby waiving his relevant rights. Incidentally, the co-petitioner Conlon failed completely to raise this issue below, which bars him from asserting it now.

Before leaving this subject, we wish to offer a few comments of our own. Where there is uttered a claim that testimony coerced [*cf.* C.P.L. § 210.20(d)] from a de-

fendant before a grand jury was employed to indict him, a motion to inspect the grand jury minutes and to dismiss the indictment would appear to be a viable device for making that determination. While courts have been disposed on occasion to permit the defendant to make his own inspection of at least some portion of the grand jury minutes with a view to thereafter moving to dismiss the indictment [see, *e.g.*, *People* v. *Seaman*, *supra*; *People* v. *Macner*, *supra*; *People* v. *Steinhardt*, *supra*; *compare*, *passim*, *Proskin* v. *County Court of Albany Co.*, 30 N.Y. 2d 15 (1972)], a claim that verbatim testimony from a previous grand jury proceeding was used as evidence to obtain an indictment before a second grand jury is readily assessed by judicial inspection. Indeed, Justice Stark carried out the relevant type of inspection herein. In view of that action, Justice Fanelli certainly was not required to duplicate his brother jurist's efforts.

Yet, fully anticipating the testimony adverted to in the motion for reargument and having, as we shall see, read the 1965 grand jury testimony of the Rosemans, the defense made no relevant objection at trial to the receipt of prosecution evidence. Nor did it request a copy of either defendant's grand jury testimony in a timely fashion. In that event, the Trial Court might have been disposed to grant the request in order that the defendant might thereafter press a Fifth Amendment claim.

However, it was not until after the prosecution's case was in, as well as a good portion of Conlon's case, that Kuss unsuccessfully made a request for a copy of his grand jury testimony (A1695-1705). The basis of that request was that Kuss wished then to pursue his "leads" theory for the first time at the trial (*ibid.*). In the course of further colloquy, the prosecutor characterized Kuss' testimony before the first grand jury in 1965 as a "masterpiece of evasion," and he added that there was nothing in those statements which could have been of value to the

prosecution. The prosecutor went on to say that the defense had been shown the transcripts of the testimony of both Rosemans before the 1965 grand jury, with the result that the defendants should have been aware of at least one independent source of the evidence against them; namely, the 1965 testimony of Gilbert Roseman (*ibid.*).

In our opinion, the denial of the pertinent request was proper. For one thing, the remarks of the prosecutor constituted the functional equivalent of a representation that the 1965 testimony of Kuss was not used by the authorities to develop "leads." Secondly, the request was too dilatory to be honored. That is to say, the prosecution's case was in, and as a practical matter the Court could not then effectively make revaluations respecting the admissibility of the evidence aforesaid. Accordingly, we submit, that the incident being described does not militate against our thesis—that the petitioners waived their pertinent rights.

F.

The Remarks of the Prosecutor in Summation Were Not Prejudicial and Where an Objection Was Properly Made, the Corrective Action of the Court Rendered Such Statements Harmless. No Objection to the Remaining Remarks During Summation Were Made and, Therefore, the Alleged Errors Were Not Preserved for Review.

When perused, the prosecutor's summation (A1838-89) at the end of this lengthy and complicated trial will, we submit, be found free of anything resembling prejudicial error. Possibly some of the remarks therein might better have been left unsaid. But, any improprieties in the summation may readily be treated as harmless (see *People* v. *Kingston*, 8 N.Y.2d 384, 387 [1960]), and we submit that the sum of innocuous improprieties is never prejudicial error.

The prosecutor was of course entitled to draw fair inferences from the evidence (*People* v. *Doody*, 172 N.Y. 165, 174-175 [1902]). While summing up, the accuracy of the prosecutor's recitation of the facts was sometimes challenged, and, where necessary, the Court took ameliorative action by instructing the jury that it was their recollection of the facts that controlled (see e.g., A1854-5). Other matters now urged upon this tribunal were not objected to in the State Courts, rendering them non-cognizable on appeal (Code Crim. Proc., Section 420-a, now C.P.L. Section 470.05 [2]; *People* v. *Pindar*, 210 N.Y. 191, reargument denied, 210 N.Y. 621 [1914]; *People* v. *Hartigan*, 210 N.Y. 144 [1913]). Lastly, a few defense objections were sustained, after which the trial judge directed the jury to disregard them. And, of course, it must be presumed that the jury followed these directions (*People* v. *Gowasky*, 244 N.Y. 451, 464 [1927]; *People* v. *Dixon*, 231 N.Y. 111, 120-1 [1921]; *People* v. *Gibson*, 218 N.Y. 70, 73 [1916]; *People* v. *Barnes*, 202 N.Y. 77, 88 [1911]).

We begin our particularized analysis of the prosecutor's summation by referring to the portion most stressed by the defendants. At the end of the summation, the prosecutor remarked that the defendants had made the Town of Islip ". . . their own little oyster, their own little public domain, to be cut, divided and plundered" (A1888). Objection to these remarks was sustained, after which the jury were instructed by the Court to disregard them (*ibid.*).

Next the prosecutor said that the petitioners "• • • could do no wrong for they were the reigning monarchs of this little Duchy of Islip; King Kuss and Khublai Conlon" (*ibid.*). Again, an objection was sustained, and, at the request of defense counsel, the presiding jurist directed the jury to disregard the relevant remarks (*ibid.*). Then the prosecutor closed his summation with the comments

quoted in petitioners' petition to which objection was not taken.

Any plaint about the remaining remarks is not cognizable now because of the lack of objection. Still, it might not be remiss for us to comment on the petitioners' contention to wit, that the remarks in question suggested that a public clamor would result if there were acquittals.

Considering the utterances as part of a long summation detailing the evidence of the defendants' guilt, they cannot rationally be interpreted as a plea to convict merely to assuage the general public and without regard to the evidence. Indeed, a much more ready implication from the quoted remarks is a plea for the jurors to abide by their oaths and convict the defendants if the proof warranted no matter how unpleasant they found such action. Moreover, it is a fair reading of the statements under scrutiny that they were prompted by a concern that the jury might acquit not because of a failure of proof, but rather because they might view the transgression herein as something that should not be punished criminally given the oft-condoned practice of bestowing gratuities in the business world. In any event, the interpretation of the prosecutor's comments advanced by the defendants, if tenable at all, is too oblique and subtle to say that the jury could have been prejudiced thereby. Accordingly, any error in this context may, beyond a doubt, be treated as harmless.

In sum, any alleged error in connection with the summation was (1) corrected by the Court; (2) not objected to and, therefore, not preserved for review or (3) should be deemed innocuous (*Chapman* v. *California*, 386 U.S. 18, 24 [1967])—the views upon which the State Courts unanimously agreed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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